Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1020

in the Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL GONZALES GELLERT,

Petitioner,

vs.

EASTERN AIR LINES, INC.

Respondent,

On Petition For a Writ of Certiorari
On Appeal From the Supreme Court of Florida

RESPONSE BRIEF OF THE PETITIONER

DANIEL GONZALES GELLERT
in the proper person
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THERE IS NO BAR AS THE CERTIORARI AND REVIEW IS BASED UPON FEDERAL LAW, AND ON CONFLICT IN THIS CAUSE AND OTHER DECISIONS OF FEDERAL APPEAL COURTS, AND A NUMBER OF FEDERAL QUESTIONS EXISTS, WHICH HAVE NOT PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT, BUT SHOULD BE.

TABLE OF AUTHORITIES

Cases	Page
Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979)	2, 4
Bei v. Harper, 475 So.2d 912 Fla.2DCA (1985)	4
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Marcone v. Penthouse Intern. Magazine for Men, 754 F.2d 1072 (1985)	4
McManus v. Doubleday & Co., Inc., 513 F.Supp. 1383 (1981)	4

JURISDICTION

The final judgment was entered by the trial court on June 12, 1984. Case No. 79-2402 (CA 10). This was affirmed per curium by the Third District Court of Florida on March 12, 1985; see: *GELLERT v. EASTERN AIR LINES, INC.*, 466 So.2d 9 mem (Fla.3DCA 1985). Rehearing was denied April 19, 1985.

The Florida Supreme Court denied jurisdiction on July 24, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. #1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

> . . . (N)or abridging the freedom of speech . . . and to petition the Government for a redress of grievances.

Article 1. Section 8. of the United States Constitution provides in part:

> To regulate Commerce with foreign Nations, and among the several States,

The Seventh Amendment of the United States Constitution provides in part:

> In Suits at common law, ... the right of trial by jury shall be preserved, and no fact

tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Eighth Amendment of the Constitution of the United States provides in part:

. . . nor cruel and unusual punishment inflicted.

REPLY TO ARGUMENTS FIRST RAISED IN OPPOSITION BRIEF

The respondent argues that Certiorari should be denied because:

1. No federal question has been raised.

2. No federal question has been raised below.

3. The decision of the state court does not conflict with any other decisions such as a decision of a federal appeals court.

4. That under Florida law, *APPLEGATE v. BARNETT BANK of TALLAHASSEE* 377 So.2d 1150 (Fla. 1979) controls, and that the determination on appeal was just and proper.

IN REPLY:

1. There are federal questions in this cause under the Constitution of the United States. Involving the First Amendment rights of both the respondent and petitioner. There is a conflict of the First

Amendment right of the respondent, and the Commerce Clause rights of the petitioner.

Since the respondent libeled as a joke, there is the imputation of an intentional tort, which was a bad faith comment and the right of personal opinion is unconstitutional. The framers of the Bill of Rights, First Amendment never intended for a previlege in an intentional tort.

The Supreme Court of the United States can not approve a libel under the First Amendment, which was published for the sole purpose of abridging the First Amendment rights of free speech of the petitioner, since this would be a government approval of cruel and unusual punishment, as applied to the petitioner. This is unconstitutional.

The medical competence of the petitioner is well established. The requirement of the medical authority of the respondent is the result of the Commerce Clause, raising other questions of privacy and Constitutional confidentiality, which this Court must review.

2. The federal question was raised below, since the appeal in the state courts resulted in a per curium affirmance, the federal question had to be preserved at the trial court. In its brief, the petitioner enclosed the Motion for a New Trial in its entirety. See: App.2-4

The petitioner did argue before the Third District Court of Appeal, and the Supreme Court of Florida the federal and Constitutional issues.

The federal court have de novo review responsibility in libel action of evidence of actual malice. See: B15. *MARCONE v. PENTHOUSE INTERN. MAGAZINE FOR MEN* 754 F.2d 1072 (1985).

3. The Final Judgment does conflict with decisions of federal appeals courts. Ashlock, the spokesman for the respondent utilized undisclosed facts, or rather undisclosed confidential medical information from the respondents file, which was unknown to the reader, which was not in the article; and as such he is not entitled to the First Amendment right to his personal opinion. B16 *CLARK v. AMERICAN BROADCASTING CO., INC.* 684 F2d 1208 (1982) B3, *McMANUS v. DOUBLEDAY & CO., INC.* 513 F.Supp. 1383 (1981).

4. *APPLEGATE v. BARNETT BANK OF TALLAHASSEE* 377 So.2d 1150 (Fla. 1979) does not control in this cause. This case involves a different circumstance: "After a nonjury trial without a reporter," there was not a record available.

The Florida Rules of Appeal, Rule 9.200 (f) (2) controls. See: *BEI v. HARPER* 475 So.2d 912 (Fla.App.2Dist. 1985). If there was an insufficiency of the record, then the petitioner had the right under this rule to provide the necessary and incomplete record on the order of the Court. This Rule prohibits the Court from taking any action, as it did in this cause until an opportunity has been provided the petitioner. This did not happen in this case. There was not an order

from the Court, and the respondent failed to enforce its rights under this Rule, as there was a remedy available. The respondent intentionally mislead the District Court, the same as it is attempting to mislead the Supreme Court of the United States presently.

ARGUMENT

The respondent, its insurance carrier U. S. Aviation Underwriters, and its attorneys have assaulted the reputation of the petitioner as a paranoid, who is not mentally competent to perform his flying duties, he is not a normal individual, and so on.

Since the trial of this cause a number of events have transpired which leads the average prudent individual on the street to come to the conclusion that the problems lie with the respondent, its attorneys and insurance company.[1]

The reason that the Constitutional rights of the petitioner have been transgressed is mainly because the respondent has been able to intentionally mislead the courts.

Francis Anania, Eastern's and USAIG's attorney of Blackwell, Walker, Gray, Powers, Flick & Hoehl P.A. of Miami, has been found and fined by the federal jurisdiction of misconduct and bad faith; false and contemptuous representations; bad faith obstruction of discovery. See: *CARLUCCI v. PIPER AIRCRAFT*

[1]See: App.1, App.2, App.3

CORP., INC. No 84-5576 November 12, 1985, United States Court of Appeals Eleventh Circuit. App.1.

Anania was the attorney of record in the initial trial of this cause. A witness in the retrial.

The instant law firm, Thornton, David & Murray, P. A. was involved in a criminal action, since one of its attorneys left the jurisdiction with about $160,000.00 of the clients money. App.2

USAIG, United States Insurance Underwriters were involved in an illegal activity, in which a clandestine investigative and management organization was siphoning NTSB, National Transportation Safety Board investigation material, to defend itself, USAIG, in insurance coverage suits. For this illegal activity Piper Aircraft was fined $160,000.00 by the NTSB. App.3.

The petitioner is on notice that the opposition, is dishonest, and will do anything to deny the petitioners Constitutional rights during these proceedings. These actions are a form of habit, and not an occurrence, but definitely the manner in which the conduct of legal business is conducted, and so it is incumbent on this petitioner to so inform the Court.

There is a responsibility that an attorney must act as officer of the Court, and not a provider of false and misleading information. See: *Carlucci Supra*, and Disciplinary Rule 7-106B.

The determination of personal opinion, is a matter of law to be determined by the court, since it is of a Constitutional First Amendment origin, and not a fact

under the Seventh Amendment of the United States Constitution.

It is unconstitutional, and therefore a reversible error, in this cause to have submitted the determination of this Constitutional question to the jury.

The Seventh Amendment makes it clear;

> and no fact tried by a jury . . . . . then according to the rules of the common law.

The jury under the Constitution can make only a determination of fact, the application and interpretation of the Constitution is not in its factual capability.

While the courts are barred from reversing and substituting their own opinion as to what the facts in a case should or should not be, a jury is not impowered to make other than a factual determination in this cause.

Since in this cause, the evidence is that a defendant/respondent libeled as a matter of right, in the mood of a joke, the intentional nature of this tort would make the granting of the defense of personal opinion unconstitutional.

As a retrial, the Third District Court of Florida already ruled that a jury could properly have made this determination, nothing that the petitioner could have said, should have said could have influenced the trial court. B14, B23-24.

To punish the petitioner for the exercise of his free speech, by a libel of this magnitude is cruel and unusual punishment.

CONCLUSION

The respondent failed to offer any substance in fact or law which would interfere or limit this Courts jurisdiction in granting Certiorari for review.

The mere fact that Eastern was successful in misleading the Third District Court of Florida by arguing *Applegate Supra*, which is not proper law in this cause, should not bar this review.

Under Florida law, as determined by the Florida Supreme Court, the cases attached by the District Court's per curium affirmance are of no significance in appeal since that Court lacked jurisdiction to review. By Eastern's own admission there was no reviewable opinion but an affirmance.

This cause must tumble back to the jury verdict granting the defendant corporation the First Amendment right to commit this libel.

The denial by the District Court the right of the petitioner to correct the record by having all the court reporters trial transcript is a reversible error, on its own, since it denied the petitioner's civil rights to a fair and impartial trial and review. The Appellate Rules should apply to rich and poor.

The Petition for Writ of Certiorari should be granted.

DANIEL GONZALES GELLERT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day of January, 1986 to: Thornton, David & Murray, P.A. Suite 100, 2950 S.W. 27th Avenue, Miami, Florida 33133

By /S/ _____
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Appendix

Friday, June 29, 1984/The Miami Herald

Piper lawyer fined for prolonging case

By LISA HOFFMAN, *Herald Staff Writer*

Two federal judges, angered by the "obstructive misconduct" of a prominent Miami lawyer in a complicated airplane crash case, Thursday ordered him to pay $10,000 as punishment for his irresponsibility.

Francis Anania, who has represented airline companies in many of the nation's worst crashes, was reprimanded for deliberately thwarting a six-year court battle involving Piper Aircraft Corp. and the relatives of three men who died in a 1976 crash.

"The record reveals that he was rude and uncooperative from the outset and that he personally obstructed the discovery process," U.S. District Judges James C. Paine and William Campbell wrote about Anania.

After approving the settlement, Campbell chastised Anania for using delaying tactics and deception throughout the case, which involved dozens of witnesses on two continents, four judges, more than 100,000 pages of documents and unusually acrimonious exchanges between attorneys for both sides.

Anania, a partner in the law firm of Blackwell Walker Gray Flick & Hoehler, intentionally dragged his feet when ordered to produce material for attorneys for the victims' families, the judges wrote in the order, filed in West Palm Beach.

Anania "has failed to perform his administrative responsibilities as an officer of this Court," they continued, stopping short of finding the attorney in contempt.

Local News

Sunday, November 24, 1985 The Miami Herald Section B

Lawyer vanishes, leaves financial muddle behind

By MARC FISHER, *Herald Staff Writer*

Carl Welch Taylor skipped the country—with $160,000 he took from his own clients, according to his boss, Calvin David.

Taylor doesn't work for the firm of Thornton, David and Murray anymore. David fired him.

The first clue came around Oct. 10, when a client complained he hadn't received a $75,000 settlement fee that Taylor had negotiated in a boat repairs case.

David had the bookkeeping department check. The money had come into the firm. It just hadn't gone out, David said.

He said Taylor had rigged the transaction. Instead of placing the money in the correct case file for forwarding, Taylor had the money put in an old file that had a name and number, but no client, David said.

"He was dumping in his time and expenses into the small case," David said. "The file had $50,000 of time on it, but he had really spent only a few hundred dollars worth of time."

The next day, David got a letter from another lawyer who said he hadn't received a $60,000 settlement.

"We checked all the accounts and there was no $60,000," David said. The firm found that the money had gone to a Fort Lauderale bank account in Taylor's name.

"The client said he thought it was odd to have to send the money to Taylor's own account," David said.

AVIATION WEEK & SPACE TECHNOLOGY June 24, 1985

Safety Board Fines Piper $160,000

Washington – National Transportation Safety Board has fined Piper Aircraft $160,000, charging that the general aviation aircraft manufacturer violated regulations by employing a company that represented insurance firms to participate in aircraft accident investigations conducted by the safety board.

Safety board regulations state that manufacturers cannot be represented by claimants or insurers during aircraft accident investigations.

The conflict between the safety board and aircraft manufacturer began in April, 1984, when Piper asked that employees of Aerospace Management Services International (AMSI) be allowed to represent the company in those accident investigations involving the aircraft manufacturer. At that time, AMSI was a wholly owned subsidiary of United States Aviation Underwriters. The management concern has been allowed to represent engine and component manufacturers in accident investigations held by the board.

"We asked Piper later in the year for records which detailed its relations with AMSI," the safety board official said. "The board wanted to satisfy itself that the management company would be representing Piper and not an insurer in the accident investigations."